SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-521

DESERT OUTDOOR ADVERTISING, INC., SEYMOUR BUXBOM and CAROL BUXBOM,

Petitioners,

vs.

COUNTY OF RIVERSIDE, a political subdivision of the State of California,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion by the Court of Appeal, 4th District, Division 2, State of California, 4th Civil 10494 (Superior Court No. 96456) filed May 18, 1971, certified for nonpublication appears in Appendix A of Petitioner's brief.

The opinion by the Court of Appeal, 4th District, Division 2, State of California, 4th Civil 10402 (Superior Court No. 89559), certified for non-publication, filed June 9, 1971, rehearing denied July 2, 1971, and hearing denied by the Supreme Court of California on August 4, 1971, appears in Appendix A of Respondent's brief.

Jurisdiction.

The petitioners invoke jurisdiction of this Court under 28 U.S.C Section 1257(e).

Reviewability by this Court is doubted by respondent for the following reasons;

1. The matter of Petitioners' rights under County Ordinance No. 348, a zoning ordinance, on which petitioners now seek review by this Court has been finally decided adversely to petitioners in the decision listed in Appendix A of Respondent's Brief.

2. The interlocutory judgment which petitioners seek to have reviewed, in addition, is not a final and effective determination of the litigation.

3. The State judgment in the interlocutory case is based on adequate and independent nonfederal grounds.

Questions Presented.

1. Whether the principle of *res judicata* applies upon the entry of the first final determination of a matter when petitioners have maintained two or more separate actions at the same time involving the same matter.

2. Whether a state rule requiring the exhaustion of administrative remedies as a prerequisite to resort to courts is jurisdictional and constitutes an adequate and independent nonfederal ground affecting review by this Court.

Statutes Involved.

The relevant statute involved is County of Riverside Zoning Ordinance No. 348 and the pertinent sections involved are set forth in Appendix A of the Petition (pages 2 and 3) and Appendix A of the Respondent's Brief (pages 2 and 3).

Statement of the Case.

The zoning ordinance of the County of Riverside, Ordinance No. 348 (Pltf. A. 2, 3; Resp. A. 2, 3), is a comprehensive zoning act governing the permissive use of land. It does not regulate business operations and only owners of land or a legal interest in land are proper parties to an action for relief under the ordinance. As shown and discussed in both Appendices A the ordinance provides means by which a proper party aggrieved by the provisions of the ordinance may obtain a variance or a change in the zoning regulations. The right to resort to courts on a zoning matter under California law is dependent upon the exhaustion of administrative remedies and is jurisdictional.

The 1960 amendment to County Ordinance No. 348 of which the petitioners complain outlawed the future erection of billboards in certain zones of the County from the effective date of the amendment, September 22, 1960, and allowed a five-year amortization period for the recovery of structural costs of billboards erected prior to that date. At this time it is noted that no criminal prosecutions were brought on boards erected prior to the effective date of the ordinance until after expiration of the allowed period for continuance. It is further pointed out that petitioners filed their original case, an equitable action for an injunction, almost one year after they were in willful and deliberate violation of the ordinance. As decided in 4th Civil 10402 (Resp. A. 8), "plaintiffs' failure to take advantage of this remedy [exhaustion of administrative remedy] bars their claim to relief in the courts."

The petitioners in this Court have introduced four separate and distinct cases in the state courts involving

their rights under County Ordinance No. 348. The original case, 4th Civil 10402 (Superior Court No. 89559) (Resp. A. 1) was filed July 8, 1966, and a judgment of dismissal was entered October 14, 1969. This judgment became final on August 4, 1971, upon denial of hearing by the Supreme Court of the State of California (Resp. A. 10). Contrary to their claims of discrimination because they were unable to obtain a temporary injunction, a temporary injunction was granted in 4th Civil No. 10402 (Superior Court No. 89559) on approximately 32 billboards operated and maintained by petitioners. Excepted from the temporary injunction, however, was criminal case No. 26146 because Petitioner Seymour Buxbom had previously been denied a writ of prohibition, in that case. This is one of the criminal prosecutions mentioned by petitioners and, it is well to note, all complaints for injunction were filed after the criminal complaint. One criminal complaint was included in the temporary injunction.

Subsequent to the original action petitioners at different times filed three separate, identical complaints for injunction and declaratory relief in the superior courts of California seeking relief from their violations of County Ordinance No. 348. In each of the cases they initially obtained restraining orders until the matter was heard on orders to show cause.

The following cases were filed in the Superior Court of the County of Riverside:

1. Indio No. 10089. Filed April 26, 1967, temporary injunction denied June 1, 1967, and case dismissed by plaintiffs October 3, 1967.

2. Indio No. 10646. Filed October 3, 1967, temporary injunction denied December 28, 1967, and action dismissed by plaintiffs January 11, 1968.

3. The present case, 4th Civil 10498 (Superior Court No. 96456, Pltf. A. 1) was filed in a foreign county, San Diego, California, on January 9, 1968, and a temporary injunction was denied without prejudice on January 22, 1968. Thereafter on January 22, 1968, the County of Riverside filed a motion for a change of venue and a demurrer which were set for hearing on February 19, 1968. Subsequent to this filing on February 7, 1968, a new restraining order was imposed by the courts, which order was subsequently declared void by the Supreme Court of the State of California in *County of Riverside v. Superior Court,* 69 Cal. 2d 828. This matter is mentioned to show that the petitioners have by use of process been able to keep almost continuously for several years restraining orders against enforcement of Ordinance No. 348 against them. Now they are before this Court stating that they have been discriminated against and restraint of prosecution has been denied. The only matter involved in the petition for review is the denial of temporary injunction which is only an interlocutory judgment and not a final decision; whereas, the decision in 4th Civil No.10402 (No. 89559) is a final decision adverse to petitioners in the matter.

The question presented by the petitioners claims discrimination and a denial of equal protection, according to petitioners, because a stipulated injunction was granted to their two major competitors. For the information of the Court, we relate the circumstances involved. The case of the two major operators is *Ryan Outdoor Advertising, Inc. and United Outdoor Advertising Co. v. County of Riverside*, Superior Court No. 92255, which was filed April 21, 1967, subsequent to petitioners' original action, 4th Civil 10402 (89559).

The case has now been tried and was submitted on November 24, 1971, and a decision is pending. The County entered a stipulated injunction because, as stated above, a temporary injunction had previously been granted to petitioners and County was attempting to accord equal treatment to all parties concerned. The temporary injunction in the *Ryan* case covered approximately 65 billboards. An additional 53; or so billboards owned by these companies were not included in the temporary injunction, probably through the same inadvertence in pleading all their boards as petitioners' failure to include the 82 billboards claimed in 4th Civil 10494 in their original case. The question presented by petitioners here was also presented to the trial court in the criminal action on which Desert Outdoor Advertising Inc. was convicted on April 20, 1970 (Pltfs. Petition p. 3) On June 21, 1971, this Court in *Re: Desert Outdoor Advertising, Inc. v. California,* No. 1664, Oct. Term, 1970, entered the following order:

> "The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of ceriorari, certiorari is denied."

ARGUMENT.

I.

The Rights of Petitioners Have Been Finally Decided Adversely to Them and Is Res Judicata.

The rights of petitioners to an injunction to prevent prosecution for violations of Ordinance No. 348 of the County of Riverside were adversely and finally decided against petitioners in 4th Civil No. 10402 (Sup. Ct. No. 89559, Resp. A. 1) which was subsequent to the decision in the interlocutory appeal from denial of a temporary injunction involved here. Denial of a temporary injunction lacks the finality requisite to review by the Supreme Court. *Republic Gas Co. v. Oklahoma*, 334 U.S. 62, 67-69.

When a judgment is entered by a court of competent jurisdiction, it is final and conclusive as to relief denied and as to all matters decided and fairly embraced therein. The judgment in 4th Civil. No. 10402 (Sup. Ct. 89559, Resp. A. 1) is a judgment on the merits and is deemed to adjudicate not only every matter which was before it but also every matter which might have been urged in support of the cause of action.

Panos v. Great Western Packing Co., 21 Cal. 2d 636, 638;

Eistrat v. Irving Lumber, 210 Cal. App. 2d 382, 390;

Escobedo v. Travelers Ins. Co., 197 Cal. App. 2d 118, 128;

Stafford v. Yerge, 129 Cal. App. 2d 165, 170;

Section 1908, California Code of Civil Procedure.

II.

The State Court Judgment Is Based Upon Adequate and Independent Nonfederal Grounds.

As previously set forth and as discussed in the decisions in both Appendices A, County Zoning Ordinance No. 348 provides administrative remedies for persons seeking relief from the requirements of the zoning ordinance. The courts of California have declared the exhaustion of administrative remedies a prerequisite to resort to courts. The matter has been declared jurisdictional.

Jensky v. State Board of Equalization, 67 Cal. App. 2d 612, 615;

Abelleira v. District Court of Appeals, 17 Cal. 2d 280, 289;

Smith v. City of Duarte, 228 Cal. App. 2d 267.

As shown in 4th Civil 10402 (Superior Court No. 89559, Resp. A. 6) the decision of the court was adverse to petitioners in that case on the ground of failure to exhaust administrative remedies. The following should be noted on page 5 of Decision 10494 (Petitioners' Appendix A): "In regard to the exhaustion of their administrative remedies, plaintiffs amended their complaint to admit that they had not sought variances under the ordinance because they did not believe that they would qualify, because an individual variance was needed for each of their 82 billboards and because the cost of applying for 82 variances would have been excessive." Under the rule of *Abelleira, supra*, both the trial court and the district court of appeals should have dismissed the case for lack of jurisdiction upon this admission of petitioners. *Auto Equity, Inc. v. Superior Court*, 57 Cal. 2d 450.

The petitioners have never been qualified under their many complaints to seek relief from the provisions of Ordinance 348. They do not allege any specific ownership or legal interest in land to entitle them to complain of zoning regulations. Only landowners or persons who have a sufficient legal interest in the land immediately involved have rights to complaint against a land zoning ordinance. *Murphy v. California*, 225 U.S. 623 (56 L.ed 1229); 55 Cal. Jur. 2d, Zoning 77, page 669.

As will be noted in the decision in 4th Civil No. 10494 demurrers to the complaint were sustained three times on the grounds of jurisdiction and failure of the complaint to state a cause of action because no ownership or legal interest in land was set forth.

Conclusion.

Since the doctrine of *res judicata* relates to the rights of petitioners under a cause of action, *e.g.*, Ordinance No. 348, and not to the particular relief sought, the petition for certiorari should be denied.

Respectfully submitted

RAY T. SULLIVAN, JR.,
County Counsel,
County of Riverside,

TILDEN L. BROOKS,
Deputy County Counsel,
Attorneys for Respondent.



APPENDIX A.

Opinion of the Court of Appeal.

Court of Appeal, Fourth District, Division Two, State of California.

Desert Outdoor Advertising, Inc., et al., Plaintiffs and Appellants, vs. County of Riverside, et al., Defendants and Respondents. 4 Civil 10402, (S. Ct. No. 89559).

Filed: June 9, 1971.

APPEAL from an order granting a motion for summary judgment, entered in the Superior Court in and for the County of Riverside. John B. Neblett, Judge. Affirmed.

Swing, Sharnikow, Lewis & Kroll, by David K. Kroll, for Plaintiffs and Appellants.

Ray T. Sullivan, Jr., County Counsel, by Tilden L. Brooks, Deputy County Counsel, for Defendants and Respondents.

BY THE COURT

On or about December 31, 1948, the Board of Supervisors of Riverside County enacted a comprehensive zoning plan, designated Ordinance 348, dividing the county into zoning districts. The effect of this ordinance was to restrict the uses to which private real property in the various zones might be put. Under the terms of the zoning plan, approximately ninety per cent of the unincorporated area in the county was placed in the M-3 zone. Among the uses permitted in the M-3 zone were outdoor advertising signs and structures, whether or not appurtenant to any other permitted use.

On September 22, 1960, the Board of Supervisors amended Ordinance 348 to read, in pertinent part:

ARTICLE III

M-3 one (Regulated Industrial)

All the unincorporated territory of the County which is not included under the terms of this ordinance in any other zone is hereby designated and classified as M-3 Zone.

Section 3.1. Uses Permitted

(a) Any use permitted in Zones M-4, A-2 and W-2 except outdoor advertising signs or structures not appurtenant to a permitted use.

ARTICLE XVIII

Section 18.6. Nonconforming Building and Uses

The following regulations shall apply to all nonconforming buildings and uses existing on the effective date of this Ordinance:

(b) A nonconforming use may be maintained for the following periods of time: . . .

3. Outdoor advertising, five years.

Section 18.23. Outdoor Advertising

(a) "Outdoor advertising" or "outdoor advertising display" as used herein shall mean outdoor advertising or sign as defined in Section 21:56, and shall include any structure, other than the surface of an existing building, which supports the outdoor advertising upon which it is placed or maintained.

ARTICLE XXI

Section 21:56 Outdoor Advertising or Sign

Any sign other than an appurtenant or public service sign. An appurtenant sign is one relating only to goods sold or services rendered upon the building site upon which said sign is erected or maintained.

The ordinance further provided means by which one might obtain a variance to the zoning regulations. Article XIX of the Ordinance provides, in pertinent part:

The following regulations shall apply to the granting of all variances:

SECTION 19.1. INITIATION OF PROCEEDINGS. When practical difficulties, unnecessary hardships or results inconsistent with the general purposes of this ordinance occur through a strict interpretation of its provisions, the Board of Supervisors or the Commission on its own motion may, or upon the verified application of any property owner or owners shall, in specific cases, initiate proceedings for the granting of a variance from the provisions of this ordinance under such conditions as may be necessary to assure that the spirit and purpose of this ordinance will be observed, public safety and welfare secured, and substantial justice done.

SECTION 19.2. NECESSARY CONDITIONS. Before any variance may be granted it shall be affirmatively shown:

(a) That there are special circumstances attached to the property referred to in the applica-

tion or motion which do not apply generally to other properties in the same district.

(b) That the granting of such variance is necessary to do substantial justice and to avoid practical difficulty, unnecessary hardship or results inconsistent with the general purposes of this ordinance.

(c) That the granting of the variance will not result in material damage or prejudice to other property in the vicinity, nor be detrimental to the public safety or welfare.

On July 7, 1966, plaintiffs filed a complaint against defendants in the Riverside County Superior Court. The Complaint alleged plaintiffs' ownership of a number of outdoor advertising signs located in Riverside County, and prayed for a temporary restraining order, and preliminary and permanent injunctions barring defendants from enforcing the provisions of Ordinance 348, as amended, and applied the outdoor advertising in the M-3 zone. Plaintiffs asserted that they were entitled to this relief because (1) Ordinance 348, as amended, constituted a deprivation of property without just compensation, in violation of California Constitution, art. I, section 14, and (2) by enacting the Outdoor Advertising Act (Business and Prof. Code, §§ 5200 et seq.), the Legislature had preempted the field of regulating outdoor advertising for the state.

Defendant County's demurrer to, and motion to dismiss the complaint were denied and the County filed an answer. Thereafter, on June 2, 1969, the defendant

County moved for a summary judgment on the grounds that (1) plaintiffs' complaint failed to state a cause of action in that it failed to allege that plaintiffs had exhausted their administrative remedies provided under the ordinance; (2) the state had not preempted the field of regulating outdoor advertising; and (3) Ordinance 348, as amended, did not constitute a taking of property without just compensation as a matter of law. Together with the motion for summary judgment, defendant made a motion to dismiss the complaint for failure to timely prosecute, under Code Civ. Proc., § 583. The motion for summary judgment was supported by the affidavit of the Riverside County Planning Director, which stated that plaintiffs had failed to exhaust their administrative remedies provided by the ordinance. Plaintiffs filed no counter-affidavits.

On October 1, 1969, the court heard arguments on defendant County's motions to dismiss and for summary judgment. The court denied defendant's motion to dismiss for want of prosecution; however, the motion for summary judgment was granted. Judgment in favor of defendants was entered accordingly on October 14, 1969. It is from this judgment that the instant appeal is taken.

Plaintiffs' sole contention in this appeal is that the trial court erred in granting defendant's motion because the pleadings raised triable issues of fact. Plaintiffs' position in this appeal is that the questions of whether the state has preempted the field of regulating outdoor advertising and whether Ordinance 348 con-

stitutes a deprivation of property without just compensation are issues of fact.

The trial court was correct in determining that as a matter of law the state has not preempted the field of regulating outdoor advertising. Business and Prof. Code, § 5227, states, in pertinent part:

> "It is the intention of the Legislature to occupy the whole field of regulation by the provisions of this chapter except that nothing in this chapter prohibits . . . the passage by any county of reasonable land uses or zoning regulations affecting the placing of advertising displays in accordance with the provisions of the Planning Law, Chapter I (commencing with Section 65000) of Title 7 of the Government Code, relating to zoning. . . ."

Government Code, § 65850, vests in county government the authority to enact zoning ordinances regulating signs and billboards. It has been repeatedly held that, as a matter of law, the Legislature did not preempt the field of regulating outdoor advertising by the enactment of the Outdoor Advertising Act. (*Desert Outdoor Advertising, Inc. v. County of San Bernardino,* 255 Cal. App. 2d 765; *County of Santa Barbara v. Purcell, Inc.,* 251 Cal. App. 2d 169.) Plaintiffs' contention in this regard is without merit.

Ordinance 348 granted a period of five years from the date it became effective during which then existing signs might be maintained as a nonconforming use. It has been held that zoning legislation may validly provide for the eventual discontinuance of nonconforming uses within a prescribed reasonable amortization period commensurate with the investment involved. (*National Advertising Co. v. County of Monterey,* 1 Cal.

3d 875; *Livingston Rock etc. Co. v. County of Los Angeles*, 43 Cal. 2d 121; *City of Los Angeles v. Gage*, 127 Cal.App. 2d 442.) However, it has been further held that in determining whether an amortization period is reasonable and commensurate with the investment involved and thus may be validly applied to the particular property and use in issue, each case must be determined on its own facts. (*National Advertising Co. v. County of Monterey, supra; Livingston Rock etc. Co. v. County of Los Angeles, supra; Beverly Oil Co. v. City of Los Angeles*, 40 Cal. 2d 552; *City of La Mesa v. Tweed & Gambrell Planing Mill*, 146 Cal.App. 2d 762.) Thus, plaintiffs' complaint raised an issue of fact.

It does not follow, however, that the trial court erred in granting defendants' motion for summary judgment. It is axiomatic that a court may grant a motion for summary judgment only when it appears from an examination of the affidavits accompanying the motion that no triable issue of fact exists and that the affidavits state facts which, if proved, would support a judgment in favor of the moving party. (Code Civ. Proc., § 437c; *State Medical Education Board v. Roberson*, 6 Cal.App. 3d 493; *Property Controllers, Inc. v. Shewfelt*, 245 Cal.App. 2d 755.) It may be proper for the court to grant a motion for summary judgment either because facts do not exist that enable plaintiffs to establish a cause of action or because facts do exist which constitute an absolute defense to plaintiffs' claim. In the instant case, defendants' motion for summary judgment, and the uncontracted affidavit of the County Planning Director asserted that plaintiffs had failed to exhaust their administrative remedies under the ordinance prior to seeking relief in the courts. These as-

sertions must be accepted as correct. (*Coyne v. Krempels*, 36 Cal. 2d 257.)

It has been repeatedly held that a party aggrieved by the application of a statute or ordinance must invoke and exhaust the administrative remedies provided thereby before he may resort to the courts for relief. Failure to exhaust such remedies bars the plaintiff from relief in the courts. (*Metcalf v. County of Los Angeles*, 24 Cal. 2d 267; *Igna v. City of Baldwin Park*, 9 Cal.App. 3d 909; *Dunham v. City of Westminster*, 202 Cal. App. 2d 245.) In the instant case, it is clear that plaintiffs did have an administrative remedy available under the ordinance. If they had been unable to fully amortize some of their billboards within the five year period granted by the ordinance, they could have applied for a variance, granting such further time as was necessary to complete the amortization. The language of Article XIX of Ordinance 348 grants the County Board of Supervisors power to grant variances for this reason. Plaintiffs' failure to take advantage of this remedy bars their claim to relief in the courts.

Judgment affirmed.

CERTIFIED FOR NONPUBLICATION.

Court of Appeal—State of California, Fourth Appellate Division, Division Two.

Desert Outdoor Advertising, Inc. vs. County of Riverside, Etc., et al. 4 Civ. No. 10402, (Riverside County No. 89559).

Filed: July 2, 1971.

BY THE COURT:

The Appellant's Petition for Rehearing is DENIED.

Dated July 2, 1971.

Tamura, J. *Acting P. J.*

Copy to: County Clerk County of Riverside, Courthouse, 92501, Swing, Scharnikow, Lewis & Kroll, 1401 U.S. Nat'l Bank Bldg., San Diego, 92101, County Counsel, Attn: Tilden L. Brooks, Dpty. C.C., Courthouse Rm. 206, Riverside, 92501.

Clerk's Office Supreme Court, 4250 State Building.
San Francisco, California 94102
Aug. 4, 1971

Dear Sir: I have this day filed Order HEARING DENIED.

Rec'd 8-6-71 In re: 4 Civ. No. 10402.

Desert Outdoor Advertising vs. County of Riverside.

Respectfully,

G. E. Bishel
Clerk